SHORGA SDN BHD

v.

AMANAH RAYA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: S7-335-2000]
10 AUGUST 2003

CIVIL PROCEDURE: *Appeal - Appeal from registrar to judge-in-chambers - Rules of the High Court 1980, O. 56 r. 1 - Whether subject to ss. 3 and 28 Courts of Judicature Act 1964 - Whether 'exclusionary definition' of 'decision' in s. 3 Courts of Judicature Act 1964 applies to appeals lodged under O. 56 r. 1 Rules of the High Court 1980 - Whether plaintiff can appeal to judge-in-chambers against decision of registrar dismissing its application for summary judgment*

CIVIL PROCEDURE: *Summary judgment - Appeal - Appeal to judge-in-chambers from decision of registrar dismissing application for summary judgment - Whether appeal lodged under O. 56 r. 1 Rules of the High Court 1980 subject to 'exclusionary definition' of 'decision' in s. 3 Courts of Judicature Act 1964 - Merits of appeal - Whether plaintiff showed prima facie case for summary judgment - Triable issues, whether matter should proceed to trial*

This was an appeal to the judge-in-chambers (under O. 56 r. 1(1) of the Rules of the High Court 1980 ('RHC')) against the decision of the deputy registrar dismissing the plaintiff's application for summary judgment. The principal issue of law that arose for decision, via the preliminary objection raised by the defendant, was whether the court was seised of the jurisdiction to hear and determine the plaintiff's appeal. In this respect, it was contended, for the defendant, that the decision of the deputy registrar dismissing the plaintiff's application for summary judgment was not one that was appealable – regard being had to s. 3 of the Courts of Judicature Act 1964 ('CJA').

Held (overruling the defendant's preliminary objection):

[1] The definition of the word 'decision' as found in s. 3 of the CJA has no application in so far as an appeal under O. 56 r. 1 of the RHC is concerned. Sections 26 to 30 of the CJA – which govern appeals from the subordinate courts to the High Court – do not apply in respect of

appeals lodged under O. 56 r. 1 of the RHC. Order 56 r. 1 of the RHC regulates appeals from the decisions of the registrar to the judge-in-chambers and is not subject to s. 3 of the CJA. It is a principle of universal application that the right of appeal can only be denied by clear and unequivocal words. (pp 420 d-h, 421 a-h, 422 a-h, 424 h & 425 a-g)

[2] In any case, the decision of the deputy registrar dismissing the plaintiff's application for summary judgment was not a 'ruling made in the course of a hearing'. (pp 423 f-g & 424 a-c)

[3] The plaintiff had failed to show a *prima facie* case for summary judgment. Its case merely rested on the bare allegations contained in the affidavit in support of its application. There were triable issues and the matter should proceed to trial. (pp 428 h, 429 a-d, 430 h & 431 a-d)

[Defendant's preliminary objection overruled; plaintiff's appeal dismissed on the merits.]

Case(s) referred to:

Aubert v. Walsh & Anor [1812] 4 Taunt 293 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Collins v. Blantern [1767] 2 Wils KB 347 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(dist)***

Gissco Sdn Bhd v. Blackgold (M) Sdn Bhd [1988] 2 MLJ 397 ***(refd)***

Jeffries v. Alexander [1860] 8 HLC 594 ***(refd)***

Magdalen College Case [1616] 11 Rep 66b ***(refd)***

Miles v. Bull [1968] 3 WLR 1090 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Philpott v. St George's Hospital [1857] 6 HLC 338 ***(refd)***

Re Ice-Mack Pte Ltd; AA Valibhoy & Sons (1907) Pte Ltd v. Official Receiver [1990] 1 MLJ 79 ***(refd)***

Sitrac Corp Sdn Bhd v. Lim Siew Eng [2002] 4 CLJ 463 HC ***(foll)***

Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd [2001] 2 CLJ 440 HC ***(not foll)***

Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd [2001] 5 CLJ 244 HC ***(foll)***

Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 CA ***(refd)***

Yap Seng Hock & Anor v. United Asian Bank Bhd & Anor [1994] 2 CLJ 319 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 26, 27, 28, 29, 30, 50, 67, 167, 168
Evidence Act 1950, ss. 4(1), 114(g),
Limitation Act 1953, s. 6
Rules of the High Court 1980, O. 14 r. 3(1), O. 56 r. 1
Subordinate Courts Rules 1980, O. 49 r. 2(2)

Civil Procedure Rules 1934 [UK], O. 35 r. 1(2)

Other source(s) referred to:
Jeffrey Pinsler, *Civil Procedure in Singapore and Malaysia*, pp 105, 106

For the plaintiff - Robert CC Low (David Lai Chung Yew); M/s Ranjit Ooi & Robert Low
For the defendant - Azhar Arman Ali; M/s Arman-Yunos

[**Editor's note:** For a recent case on O. 56 r. 1 Rules of the High Court 1980 and s. 3 Courts of Judicature Act 1964, please see also the judgment of Hishamudin J in *OCBC Bank (Malaysia) Bhd v. Stephen Hansford Sales (M) Sdn Bhd & Ors & Anor Suit* [2004] 1 CLJ 51 HC.]

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Introduction
It is salutary to set out the brief background to this case. It is as follows:

(i) the plaintiff filed an application *vide* encl. 14 for summary judgment;

(ii) on 27 February 2001, the learned deputy registrar dismissed encl. 14 with costs;

(iii) the plaintiff filed an appeal to the judge in chambers as seen in encl. 24; and

(iv) that encl. 24 was filed pursuant to O. 56 r. 1(1) of the Rules of the High Court 1980 ("RHC").

The Defendant's Preliminary Objection
It is the contention of the defendant's counsel, by way of a preliminary objection, that this court has no jurisdiction to hear and determine encl. 24 on the ground that the order of the learned deputy registrar is not appealable.

Notwithstanding the fact that this preliminary objection was raised rather belatedly, I shall, out of deference to the parties, deal with it forthwith.

It is the submission of the learned counsel for the defendant that the decision or order of the learned deputy registrar has no element of "finality" and so it is not appealable. It is stressed that the decision of the learned deputy registrar is purely interlocutory in nature. Reliance was placed on section 3 of the Courts of Judicature Act 1964 ("CJA") and the case of *Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd* [2001] 2 CLJ 440 as well as the case of *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [1999] 1 CLJ 537. The former was a case decided by Richard Malanjum J (now JCA) and the latter was decided by the Court of Appeal with the coram of Lamin PCA, NH Chan and Ahmad Fairuz JJCA.

With respect, I am of the considered view that the defendant's preliminary objection is totally baseless and must be construed as untenable for the following reasons. These reasons, however, are not in its chronological order and they must be taken cumulatively.

Section 3 Of The CJA Has No Application In Relation To An Appeal Under O. 56 r. 1(1) Of The RHC

The appeal in encl. 24 was brought specifically under an express provision of the RHC, *viz*, O. 56 r. 1(1) of the RHC which clearly provides that, "An appeal shall lie to a judge in chambers from any judgment, order or decision of the registrar." The definition of the word "decision" as found in s. 3 of the CJA states as follows:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties.

and it has no application in so far as O. 56 r. 1 of the RHC is concerned. An analysis of the provisions of the CJA will now be undertaken in order to show why that is so:

(a) The specific provisions pertaining to the appellate jurisdiction of the High Court are provided for under ss. 26 to 30 of the CJA. As an example, the appellate civil jurisdiction of the High Court to hear appeals from the subordinate courts is conferred under s. 27 of the CJA. The word "decision" also appears and is used in s. 28 of the CJA. It is noteworthy to note that ss. 26 to 30 of the CJA are only in relation to appeals – both civil and criminal jurisdictions, from the subordinate courts to the High Court. Thus, these sections are of no application in

so far as an appeal lodged under O. 56 r. 1 of the RHC is concerned. Consequently, the definition of the word "decision" that appears in s. 3 of the CJA in so far as s. 28 of the CJA is concerned does not come into play in the instant case.

(b) Then there is s. 50 of the CJA which employs the word "decision". That section deals with and is in relation to criminal appeals from the High Court to the Court of Appeal. So that section – referring to s. 50 of the CJA, does not apply to a situation where an appeal is lodged under O. 56 r. 1 of the RHC. Consequently, the definition of the word "decision" that appears in s. 3 of the CJA in so far as s. 50 of the CJA is concerned does not come into play in the instant case.

(c) Conversely, in relation to civil appeals from the High Court to the Court of Appeal under s. 67 of the CJA, the word "decision" is not employed at all. Instead, the operative words employed are "any judgment or order". Hence, the word "decision" that appears under s. 3 of the CJA has no application herein. It is apt now to refer to the case of *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377, a decision of the Court of Appeal with a coram of NH Chan, Abu Mansor and Haidar JJCA. In delivering the judgment of the Court of Appeal, NH Chan JCA had this to say at p. 382 which must surely apply to the case at hand:

> It is to be noted that the word 'decision' is not used in s. 67(1), so that, there is no compelling reason to refer to s 3 of the Act for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s. 3. This is because, in s. 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature.

(d) I say that there is no specific or general provision in the CJA in regard to appeals from the registrar of the High Court to the judge of the High Court as contemplated and provided for under O. 56 r. 1 of the RHC. Sadly, the CJA makes no legislative provisions in regard to appeals from the registrar of the High Court to the judge of the High Court. That being the case, the word "decision" as defined under s. 3 of the CJA do not apply to a situation where an appeal is lodged under O. 56 r. 1 of the RHC. It is my judgment, that s. 3 of the CJA has no application in relation to an appeal under O. 56 r. 1 of the RHC. It is also my judgment, that the authority of *Teoh Poh Keong Sdn Bhd (supra)* which dealt with an appeal under O. 56 r. 1 of the RHC ought not to be followed. In any event, I am not bound by that authority.

(e) It is interesting to note that the authority of *Teoh Poh Keong Sdn Bhd (supra)* was not followed by Nik Hashim J (now JCA) in the case of *Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd* [2001] 5 CLJ 244. The court in *Thong Guan Construction Sdn Bhd (supra)* held, *inter alia,* that:

(i) an appeal under O. 56 r. 1 of the RHC is not strictly an appeal *per se* but rather a re-hearing; and

(ii) that the provisions of O. 56 r. 1 of the RHC are specific provisions and they should prevail over the general provisions as encapsulated in s. 3 of the CJA.

It is my judgment that to incorporate the definition of the word "decision" under s. 3 of the CJA onto O. 56 r. 1 of the RHC would result in an absurd reading of O. 56 r. 1 of the RHC.

The Right Of An Appeal Can Only Be Denied By Clear And Unequivocal Words

Clear and unequivocal words must be employed in order to deny the right of an appeal from a particular decision handed down by an adjudicating officer. There are certainly no clear words appearing in the RHC denying the plaintiff such a right of appeal. Now, *Sitrac Corp Sdn Bhd v. Lim Siew Eng* [2002] 4 CLJ 463 was a decision of Abdul Aziz J (now JCA). Although that case dealt with appeals from the subordinate courts to the High Courts – the applicable provisions being s. 28 of the CJA and O. 49 r. 2(2) of the Subordinate Courts Rules 1980, yet the principle enunciated in that case is of universal application. The principle being: the right of an appeal can only be denied by clear words.

It is my judgment that s. 3 of the CJA does not aid the defendant at all. It cannot exclude appeals like the kind of appeal that is found in encl. 24. I must say with a certain measure of certainty that the interpretation sought to be placed on s. 3 of the CJA cannot be accepted by me. It is totally untenable.

I have reproduced in verbatim the definition of the word "decision" as found in s. 3 of the CJA. The exclusionary words that appear in s. 3 of the CJA read as follows:

> …, but does not include my ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties.

In my considered view, the correct approach to be undertaken in ascertaining whether a "decision" as contemplated under s. 3 of the CJA is to be excluded must necessarily entail an interpretation of the entire exclusionary words as reproduced above and not by way of nit-picking only certain portions of the exclusionary words as sought to be done by the learned counsel for the defendant. By way of an elaboration, it is appropriate to say that the exclusionary words may be divided into three salient aspects:

(a) any ruling;

(b) made in the course of a trial or hearing of any cause or matter; and

(c) which does not finally dispose of the rights of the parties.

These salient aspects must be present before the exclusionary words could be invoked.

Now, in the context of encl. 24, I have this to say:

(a) there was no "ruling" made by the learned deputy registrar given the illustrations of "ruling" as set out by Abdul Aziz J (now JCA) in *Sitrac Corp Sdn Bhd*, and so in this regard, the order dismissing the plaintiff's O. 14 application was not a "ruling";

(b) it was also not a "ruling made in the course of a hearing"; and it was quite apparent that the dismissal of the plaintiff's O. 14 application was made after hearing of the application and not in the course of the hearing; and

(c) to borrow the words of Abdul Aziz J (now JCA) in *Sitrac Corp Sdn Bhd* "a ruling made in the course of the hearing of an application must be a ruling on some point other than the ultimate question whether the application is to be allowed or dismissed" (see p. 466 of *Sitrac Corp Sdn Bhd*).

It is pertinent to note that Justice Abdul Aziz (now JCA) in *Sitrac Corp Sdn Bhd* refused to follow *Teoh Poh Keong Sdn Bhd.* I would gratefully follow the learned views of Justice Abdul Aziz (now JCA) in *Sitrac Corp Sdn Bhd.* It is also pertinent to note that in *Sitrac Corp Sdn Bhd*, the appeal there was under O. 49 r. 2(2) of the Subordinate Courts Rules 1980 and it was in relation to a striking out application which originated from the subordinate court to the High Court. Clearly, ss. 3 and 28 of the CJA came into play and notwithstanding the same, Justice Abdul Aziz (now JCA) held that the exclusionary words that appear in s. 3 of the CJA were not applicable to the circumstances of the case there.

The Authority Of *Dato' Seri Anwar Ibrahim V. Public Prosecutor (supra)* Is Of Limited Application And It Is Applicable To Criminal Cases Only

The learned counsel for the defendant sought to rely on the case of *Dato' Seri Anwar Ibrahim v. Public Prosecutor* but that case has been expressly confined by the Court of Appeal to situations involving criminal appeals to the Court of Appeal against the decision made by the High Court. In the words of NH Chan JCA in the case of *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd (supra)* at p. 381:

> In *Anwar*'s case, this court was dealing with a criminal appeal against a decision made by the High Court. Section 50 of the Courts of Judicature Act applies only to criminal appeals against a decision of the High Court. For the meaning of the word 'decision' in s. 50 of the Act, s. 3 (as presently conceived) is referred to for its definition. So that, the Anwar decision is authority only for criminal appeals to the Court of Appeal against a decision made by the High Court.

That being the case, it is my judgment that the case of *Dato' Seri Anwar Ibrahim v. Public Prosecutor* has no application to the present appeal at hand.

The Interpretation Placed By The Learned Counsel For The Defendant Will Lead To Absurdity

Now, to accept the learned counsel for the defendant's submission that the decision of the learned deputy registrar is not appealable will certainly lead to manifest absurdity. The logical extension of the learned counsel for the defendant's submission will bring forth the following repercussions:

(a) If one were to accept the submission of the learned counsel for the defendant, the floodgates of litigation will open and this court will be inundated with numerous applications to set aside all the previous orders and/or judgments and/or decisions made pursuant to an appeal under O. 56 r. 1 of the RHC for want of jurisdiction. This would be consistent with and predicated upon the principle enunciated in the case of *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, a decision of the Federal Court with a coram of Eusoff Chin Chief Justice, Mohd Azmi, Peh Swee Chin, Wan Adnan FCJJ and Gopal Sri Ram JCA, where the Federal Court ruled that an order can be subsequently set aside on the ground that the court lacked jurisdiction.

(b) It would tantamount to effectively holding that in all applications for summary judgment, an order dismissing the said application would not be appealable and could not be appealed against by the plaintiff under O. 56 r. 1 of the RHC whereas such a right of appeal would only be accorded to the defendant in instances where the said application was allowed by the learned deputy registrar. That would be an inconsistent and an intolerable legal procedure that merely benefit one side and not the other. And that would not be sanctioned by this court.

(c) The benefit and utility that flow under O. 56 r. 1 of the RHC will be rendered ineffectual and redundant. Some examples would be particularly useful at this juncture. Thus, the innumerable applications that came up, pursuant to the RHC, before the registrars will no longer be appealable. Again, the parties to applications for security for costs or for further and better particulars will not be able to appeal against the registrars' decisions for allowing or dismissing such applications because according to the defendant such applications are merely interlocutory orders that do not finally dispose of the parties' rights as the substantive trial and the hearing of the matter are still pending. It is my judgment that this cannot be the true legal position as intended by the legislature. Now, it is quite trite that "the office of the judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief" (*Magdalen College Case* [1616] 11 Rep. 66b). According to Lord Cranworth LC in *Philpott v. St. George's Hospital* [1857] 6 HLC 338, the duty of the court is to carry out effectually the object of a statute and in order to do so the statute must be so construed so as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which

it has prohibited or enjoined. The appropriate latin term would be quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. In the same vein, Blackburn J echoed the same sentiment in the case of *Jeffries v. Alexander* [1860] 8 HLC 594. In order to prevent evasion, the courts will always adopt two approaches in constructing a statute. The first would be this. That mindful of the mischief rule, the court will not be astute to narrow the language of a statute so as to allow persons within its ambit and purview to escape its net. The second approach would be this. That the statute may be applied to the substance rather than the mere form of the transaction. The courts are always vigilant. If there is any attempt at concealment, the courts will "brush away the cobweb varnish, and shew the transactions in their true light" (per Wilmot CJ in *Collins v. Blantern* [1767] 2 Wils. KB 347).

For the reasons as adumbrated above, I dismissed the preliminary objection as advanced by the learned counsel for the defendant. I must now proceed to examine the merits of the appeal in encl. 24.

The Facts Supporting The Plaintiff's Claim

The plaintiff was incorporated under the Companies Act 1965 ("said Act") and for all intents and purposes the plaintiff is said to be a private exempt company within the definition of the said Act. At all material times, the late Raja Nong Chik bin Raja Ishak ("Allahyarham Raja Nong Chik") was a shareholder and director of the plaintiff. Allahyarham Raja Nong Chik passed away on 10 February 1994. The defendant was then appointed as the administrator of the estate of Allahyarham Raja Nong Chik pursuant to an order of court and this was on 17 December 1996. Now, on or about 24 August 1993, the plaintiff gave an interest free friendly loan of RM1 million to Allahyarham Raja Nong Chik. That loan was said to be payable on demand. The cheque bearing the sum of RM1 million was issued in the name of Allahyarham Raja Nong Chik and it was marked "Account Payee Only".

It seemed that the defendant was sued in its capacity as the administrator of the estate of Allahyarham Raja Nong Chik. It was said that, at all material times, the defendant in its capacity as the administrator of the estate of Allahyarham Raja Nong Chik knew or ought to have known of that loan bearing in mind that the fact of that loan and the cheque concerned were furnished to the defendant's then solicitors as early as 31 January 1997. It was averred that the defendant, at all material times, never disputed the said loan.

It must be borne in mind that as at the date of the death of Allahyarham Raja Nong Chik, the said loan has not been repaid and the plaintiff too made no demand for the return of the said loan.

The plaintiff, by way of letters from its solicitors dated 5 April 2000 and 11 April 2000, had demanded from the defendant the repayment of that loan. Nevertheless the defendant, to date, has failed and/or neglected and/or refused to repay the said loan. The plaintiff now brings this action to recover the said loan from the defendant.

It must be borne in mind that the defendant has yet to file its statement of defence.

The plaintiff's claim was founded on contract. The evidence tendered on the part of the plaintiff included the sworn testimony of Raja Noraini – the daughter of Allahyarham Raja Nong Chik. That sworn testimony was in the form of affidavits and the cheque in question was produced. At all material times, Raja Noraini was:

(a) A director of the plaintiff and she was also one of the signatories to the cheque in question.

(b) She had personal knowledge of the transaction in question and she had positively averred as such. It was said that the terms of the contract including payment on demand were within her own personal knowledge.

After hearing the submissions of the parties, I refused to allow the appeal in encl. 24. There were, in my judgment, triable issues that ought to proceed to trial. I shall now examine those triable issues not in its chronological order.

Mere Evidence Of Disbursement Of Moneys Does Not Give Rise To A Presumption Of A Loan Or Advancement

Put in a nutshell, summary judgment is a final judgment given to the applicant without the need of a trial. It is a final judgment that is based on the affidavit evidence. Jeffrey Pinsler in his book entitled *"Civil Procedure in Singapore and Malaysia"* wrote at p. 105 of the book:

> There have been numerous cases in which the courts have had to consider whether 'there is an issue or question in dispute which ought to be tried', or what is commonly referred to as a 'triable issue' (*Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400; *Chung Khiaw Bank Ltd v. Bhajwani & Anor* [1990] 2 MLJ 146 (HC), [1990] 3 MLJ 260 (CA); *United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors* [1990] 1 MLJ 280; *Tong Lee Hua v. Yong Kah Chin* [1981] 2 MLJ 1; *Citibank NA v. Ooi*

Boon Leong & Ors [1981] 1 MLJ 282; and *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382). Such an issue may be established by showing that there is a defence to the claim, a dispute on the facts (*Saw v. Hakim* [1889] 5 TLR 72), or that a point of law or construction requires determination (*The Electric and General Contract Corp v. The Thomson-Houston Electric Co* [1895] 10 TLR 103, and *Cow v. Casey* [1949] 1 KB 474). Once the plaintiff has shown a *prima facie* case that he is entitled to apply for summary judgment, it is then for the defendant to show cause why judgment should not be entered *(Alliance (Malaya) Engineering Co Sdn Bhd v. San Development Sdn Bhd* [1974] 2 MLJ 94, at page 98; and Order 14, rule 4(1) of the Rules of the High Court 1980).

At p. 106 of the book, the learned author continued to write:

In *Jacobs v. Booth's Distillery Co.* [1880] 5 App Cas 685, the House of Lords declared that the court's role at the hearing of an application for summary judgment is not to delve into the merits of the issues raised by the defendant. The court is merely required to determine whether an issue has been raised which should be adjudicated upon at trial. Once a triable issue has been raised, it is not for the court to consider whether the defendant is likely to succeed or fail on it. Applying this principle to the facts of the case, Lord James of Hereford stated: 'it appears to me that there is a fair issue to be tried. On which side the chances of success are is not for this House to determine ...' (*ibid*, at page 263). This principle was echoed by Lee Hun Hoe CJ in *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382, in which his Lordship said:

> A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial (Ibid, at page 390).

I am grateful to the learned author for his lucid exposition of the law and I gratefully adopt them here.

In my judgment, the plaintiff has failed to show a *prima facie* case for summary judgment. In the statement of claim, the plaintiff merely alleged that a debt was due as a result of non-payment of an alleged friendly loan given by the plaintiff to Allahyarham Raja Nong Chik. In encl. 15 – which was the plaintiff's affidavit in support, the deponent stated her belief that:

(a) allegedly a debt was due;

(b) and that debt arose from an alleged "friendly loan"; and

(c) the cheque in exh. P8 of encl. 15 was the cheque for the amount claimed which was in the name of Allahyarham Raja Nong Chik.

Incidentally the affidavit in support in encl. 15 was affirmed by Raja Noraini – the daughter of Allahyarham Raja Nong Chik. The statement of account of the plaintiff also annexed as exh. "P8" to encl. 15 merely showed that the sum of RM1 million had been withdrawn but it did not show to whom that money went to. The subsequent affidavit of Raja Noraini in encl. 18 did not allude to any further fact that would support the plaintiff. So it can be surmised that the plaintiff was merely resting its case on the bare allegations in the affidavit in support in encl. 15 and the existence of exh. "P8" which merely showed that the moneys were paid to Allahyarham Raja Nong Chik. Since a final judgment would only be based on the affidavit evidence, material facts must be alluded to therein in order to support the claim beyond any reasonable doubt. The question to pose would be this: whether the mere evidence of a disbursement of moneys in favour of Allahyarham Raja Nong Chik would raise the presumption, either of fact or law, that it was a friendly loan? If such a presumption arises, then and only then would the burden shifts to the defendant to show sufficient cause by way of affidavit or otherwise. Section 4(1) of the Evidence Act 1950 enacts as follows:

> Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it

I have read s. 114 of the Evidence Act 1950 in its entirety and there is nothing in it or in its illustrations to establish any presumption in favour of the plaintiff. The cheque in exh. "P8" of encl. 15 merely showed that the moneys were given in the name of Allahyarham Raja Nong Chik. And it was certainly erroneous to conclude that it was in the nature of a "friendly loan". As I see it, there was no other corroborative evidence or documents to support that it was for a "friendly loan" save for the allegations made by the deponent in the affidavit in encl. 15. In *Yap Seng Hock & Anor v. United Asian Bank Bhd. & Anor* [1994] 2 CLJ 319, Richard Talalla J at p. 329 aptly said:

Section 101 of the Evidence Act 1950 (the Act) provides that whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. It is stated in s. 102 of the Act that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In s. 103 of the Act it is provided that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The plaintiffs in seeking to establish their claim of compromise against the Bank relied on no more than their affidavit evidence and the letters adduced in evidence. Their story was denied by the Bank's solicitor who likewise deposed to the same in an affidavit. The affidavits standing by themselves were insufficient for the plaintiffs to discharge the onus cast on them by the said provisions of the Act.

And it must be borne in mind that the plaintiff is a private exempt company within the definition of the said Act. That being the case, the plaintiff must surely be subject to the various rules and regulations under the said Act – especially in respect of its affairs and its accounts. In this regard, ss. 167 and 168 of the said Act impose on the plaintiff as a company a duty to keep accounts. Section 169 of the said Act also imposes a duty on a company like that of the plaintiff to have a profit and loss account and its balance sheet audited and laid before the company at its Annual General Meeting. Everything must be documented. So the plaintiff ought to have contemporaneous documents in its custody like the resolutions or the statement of affairs or the accounting statements in order to show the *prima facie* evidence of a friendly loan. Sadly, none was tendered by the plaintiff. It must be emphasised that the defendant has specifically challenged the absence of these types of crucial documents as seen in the affidavit in reply of Abquary bin Abdul Aziz in encl. 17. Was there something to hide? Only a trial of the action can determine the truth. Exhibit "P8" of encl. 15 should give rise to a presumption that it could not have been a friendly loan as alleged given the fact that the plaintiff is a company and the lack of contemporaneous documents to support the existence of a friendly loan. An adverse inference can be drawn when the opposing party failed to address a material issue which was specifically raised in the affidavit (*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609). I am therefore constrained to invoke the presumption under s. 114(g) of the Evidence Act 1950 against the plaintiff for the following reasons:

(i) the defendant did challenge the plaintiff that there were no contemporaneous corporate documents to corroborate the bare allegation of a loan as seen in para. 10 of encl. 17;

(ii) yet the plaintiff failed to address this issue in its subsequent affidavit in encl. 18, and the plaintiff in para. 5.1 of encl. 18 merely averred that there was no written contract between the plaintiff and Allahyarham Raja Nong Chik because it was a friendly loan;

(iii) even assuming that it was a friendly loan as alleged by the plaintiff, surely it was incumbent on the part of the plaintiff to answer the matters raised in para. 10 of encl. 17 in regard to the absence of contemporaneous corporate documents such as accounting records and resolutions indicating the existence of such a loan;

(iv) it goes without saying that all the corporate documents of the plaintiff are with the plaintiff and the failure to address those issues that were raised in para. 10 of encl. 17 must give rise to an adverse inference under s. 114(g) of the Evidence Act 1950; and

(v) it would only be just that this court should undertake a closer examination of all those matters at the trial and that leave to defend should be granted to the defendant.

It is now trite law that proof of a cheque, by itself, is not sufficient evidence of a debt. In *Aubert v. Walsh & Anor* [1812] 4 Taunt 293, Mansfield CJ aptly laid down the principle that proof of the delivery and payment of a cheque by itself was not sufficient evidence of a debt. I gratefully apply this simple principle of law to the facts of the present appeal.

There Ought To Be Some Other Reason For A Trial

As the lawful administrator of the estate of Allahyarham Raja Nong Chik, the defendant only came into the picture, so to speak, well after the fact. It cannot be said that the defendant had the implied or the express knowledge of the alleged friendly loan. The defendant was not in possession of any documents either to prove or disprove the plaintiff's allegations of the friendly loan. At this juncture, the principle of law as laid down in *Miles v. Bull* [1968] 3 WLR 1090 should be vigorously applied. At p. 1096 to p. 1097, Megarry J aptly said:

I think it is. In my judgment 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think that it would be just if the plaintiff were able to enforce the rights which he claims without being put to strict proof that they do enable him to evict the defendant. I was told that, in granting leave to defend, Master Jacob said that the case was 'too near the bone for Order 14.' That, if I may say so, seems to me to summarise admirably what I have tried to express in greater detail. Order 14 is for the plain and straightforward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.

I also bear in mind what Bramwell L.J. said in *Harrison v. Bottenheim* [1878] 26 WR 362, 363. Even on the old wording of Order 14.

> though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within Order 14, and should not be pursued without his being allowed to defend.

Bramwell L.J. also referred to the remarkable fact that that action was on a bill of exchange three years old, and so the case was one of a stale claim, a circumstance perhaps matched by the remarkable promptitude of completion in the case before me. I do not, of course, decide that this is a case in which leave to administer interrogatories should be given, for that point is not before me for decision; but with the relevant facts peculiarly within the knowledge of the husband and the plaintiff, it seems to me that there is at least a strong *prima facie* case for the interrogatories, discovery and cross-examination which will be available if the case goes to trial, but which will be shut out if there is summary judgment.

In those circumstances, I consider that the right course to take is to dismiss the appeal, and allow the defendant to defend the action; and this I do.

A final judgment, at this stage, would certainly be prejudicial to the defendant. The defendant should be given the opportunity of cross-examining the witnesses, and to obtain further documents by way of discovery. I need to highlight three authorities that should be cited here. The first would be the case of *H Stacey v. Diamond Metal Products Co, Ltd & Anor* [1935] MLJ 249, a decision of Terrell J. There his Lordship was concerned with the question of the admission of an affidavit under O. 35 r. 1(2) of the Civil Procedure Rules 1934. The affidavit was affirmed by one JFS Hunter and it was endorsed upon a letter written by JFS Hunter to the first

defendant company on 12 July 1954. The writ was issued on 10 August 1934 but between the date of the letter and the issue of the writ, JFS Hunter died in England. Had JFS Hunter been alive, his evidence would have been very material. Terrell J ruled that the affidavit should not be used as evidence under O. 35 r. 1(2) as it was not made in a pending cause or matter and was therefore inadmissible as an affidavit and also the fact that the plaintiff had no opportunity of cross-examining JFS Hunter. Of course, here, Allahyarham Raja Nong Chik did not affirm an affidavit that was endorsed upon a letter before he passed away like what JFS Hunter did, and by a logical extension what transpired between Allahyarham Raja Nong Chik and the plaintiff before his untimely demise would best be resolved at the trial proper.

The second case worthy of reference would be that of *Re Ice-Mack Pte Ltd; AA Valibhoy & Sons (1907) Pte Ltd v. Official Receiver* [1990] 1 MLJ 79, a decision of Yong Pung How J (as he then was). That was in regard to proof of debt in a winding up where the liquidator challenged the debt and repeatedly asked for evidence of the debt like producing credit and debt notes, the vouchers and receipts and other documentary evidence but they were not forthcoming. The court therefore concluded that there was failure to prove that the debt was owed and forthwith dismissed the application.

The third case would be that of *Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd.* [1988] 2 MLJ 397, a decision of Tan Chiaw Thong J. After examining the available evidence, his Lordship held that although the defendant may not have satisfied the court with regard to any specific issue or question in the dispute which should go to trial, yet the defendant has satisfied the court that for some reason there should be a trial of the claim of the plaintiff.

Now, in the context of the present appeal, there were numerous questions that were left unanswered and clamouring to be answered. It would be useful to list down some of these nagging questions and I shall do so now:

(a) Was it really a friendly loan?;

(b) What was the reason for that loan?;

(c) Why were there no other contemporaneous corporate documents to support the averment of the existence of that loan?;

(d) What about the earlier entry in the statement of account of the plaintiff marked as exh. "P8" in encl. 15 where in August 1993 there was a sum of RM1.5 million being deposited in the plaintiff's account? Was this sum related to the moneys subsequently released to Allahyarham Raja Nong Chik later in the same month?

(e) Why was there no proof of the friendly loan when the defendant requested for it?

The phrase "that there ought for some reason to be a trial" that appears in O. 14 r. 3(1) of the RHC has been peppered by the word "justice" in *Miles v. Bull*. I may venture to add that that phrase is very flexible and it extends to any fact varying situation. Thus, the letter dated 13 April 2000 from the defendant to the plaintiff's solicitors marked as exh. "A" to the affidavit in reply affirmed by Abquary bin Abdul Aziz which showed that the defendant had advertised in the local newspapers to get the necessary feedbacks whether Allahyarham Raja Nong Chik had any debts did not receive any response from the plaintiff and so the defendant put the onus of proof onto the plaintiff. That letter makes for an interesting reading pleasure and it was worded as follows:

Per: Friendly Loan of RM1 Million by Shorga Sdn Bhd
To Raja Nong Chik bin Raja Ishak

Merujuk kepada perkara di atas dan surat tuan bertarikh 5 dan 11hb April 2000 dimaklumkan bahawa kami sebagai Pentadbir telah mengiklankan di dalam akhbar-akhbar tempatan pada 23 dan 24hb Disember 1996 bagi mendapatkan maklum balas sekiranya terdapat tuntutan daripada mana-mana pihak bahawa simati ada mempunyai hutang dengan mereka tetapi kami tidak menerima sebarang tuntutan daripada anak guam tuan.

Oleh yang demikian, sehingga tuan dapat mengesahkan bahawa simati ada mempunyai hutang dengan anak guam tuan maka kami tidak dapat melayani tuntutan tuan ini.

Sekian, terima kasih.

In her affidavit, Raja Noraini averred at para. 5.2 of encl. 18 to the effect that the plaintiff did not receive the letter in question. That being the case, surely the matter should proceed to trial.

The Plaintiff's Action Barred By Section 6 Of The Limitation Act 1953

Section 6 of the Limitation Act 1953 sets the time frame for bringing an action founded in contract to six (6) years from the accrual of the cause of action. So, the crucial question to pose would be this: when does time begin to run? There are two possible scenarios to envisage. The first scenario would be this. That time begins to run six (6) years from the date of disbursement of the so-called "friendly loan" which was said to be a simple oral contract between the contracting parties. Under the first scenario, time begins to run on 24 August 1993 which was the date the alleged loan was given. So, by 24 August 1993 the plaintiff's cause of action was complete and time ran from that date for a period of six (6) years and time ended on 23 August 1999. Now, since the plaintiff's writ was issued on 22 May 2000, the plaintiff's action was certainly time barred.

The second scenario would be like this. Even assuming that "formal written demand" is the requirement of the contract between the parties, the untimely demise of one contracting party – referring to Allahyarham Raja Nong Chik, has rendered the "friendly loan contract" frustrated. Thus, the remedy available for the surviving party – referring to the plaintiff, would not be for breach of contract for failure to pay but rather it should have been founded on the breach in view of the contract being frustrated. The frustration sets in by the supervening event of death. So, time begins to run upon the death of Allahyarham Raja Nong Chik and this was on 10 February 1994 and it would run for six (6) years and it would end on 9 February 2000. Since the plaintiff's writ was issued on 22 May 2000, the plaintiff's action was again time barred.

These two scenarios would certainly add a new complexion to the appeal in encl. 24.

The Phrase "Repayable Upon Demand", Was It A Term In The So-called Friendly Loan?

This phrase was used by the plaintiff's solicitors in its letter of demand to the defendant. It was a unilateral imposition of a term of the contract by the plaintiff after the demise of Allahyarham Raja Nong Chik bearing in mind that this term was incorporated in the letter of demand dated 5 April 2000 as seen in exh. "P11" of encl. 15. Even assuming that it was in the nature of a "friendly loan", no one can positively say, at this juncture, that the phrase "payable upon demand" was the agreed term between the contracting parties. A close scrutiny would be required and it would best be done at the trial proper. At any rate, the proposition that the alleged loan was "payable upon demand" was diametrically opposed to the

contention that the alleged loan was in the nature of a "friendly loan". There was thus a dispute as to the facts and applying what Jeffrey Pinsler had said in his book which was referred to earlier, the whole matter should proceed to trial.

I have endeavoured to set out the triable issues and I do not propose to delve into the merits of these issues. All these triable issues should be adjudicated at the trial proper.

Conclusion

For all the reasons as adumbrated above, I dismissed the plaintiff's appeal in encl. 24 with costs. Leave to defend should be granted to the defendant forthwith.